Filed 7/2/19 Fuller v. FCA US LLC CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NORMA FULLER, Plaintiff and Respondent, v. FCA US LLC, Defendant and Appellant; NEIL GIELEGHEM, Intervener and Respondent.	B286224 (Los Angeles County Super. Ct. No. BC556964)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Hawkins Parnell Thackston & Young, Barry R. Schirm and Brian Yasuzawa for Defendant and Appellant FCA US LLC.

Rosner, Barry & Babbitt, Hallen D. Rosner and Arlyn L. Escalante for Plaintiff and Respondent Norma Fuller.

Consumer Legal Remedies, Michael D. Resnick and Neil Gieleghem for Intervener and Respondent Neil Gieleghem.

A jury awarded plaintiff and respondent Norma Fuller $109,357.05 under the Song-Beverly Consumer Warranty Act (Civil Code § 1790 et seq.).[1] Fuller subsequently moved for attorney fees under section 1794, subdivision (d), as well as a multiplier enhancement. The trial court awarded Fuller the lodestar and the requested multiplier, for a total attorney fee award of $327,782.75.

Defendant and appellant FCA US LLC (FCA) now appeals from the attorney fee award. It contends that the court abused its discretion by awarding the multiplier. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Fuller purchased a brand-new 2010 Dodge Journey in February 2011. The vehicle was covered by a warranty issued by FCA. The vehicle had brake problems, which Fuller unsuccessfully attempted to remedy first by visiting a dealership multiple times and then by installing aftermarket parts. In September 2014, Fuller filed Song-Beverly, or "lemon law," claims against FCA. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 (*Murillo*).)

On the eve of the May 2017 trial, Fuller and FCA stipulated that the Journey qualified for repurchase under the

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[1]All further statutory references are to the Civil Code unless otherwise indicated.

Song-Beverly Consumer Warranty Act, and that FCA did not promptly replace or buy back the vehicle. The jury was asked to decide whether Fuller suffered any incidental and consequential damages. It also had to decide whether FCA willfully failed to comply with its Song-Beverly obligations, and, if so, the civil penalty to which Fuller was entitled.

The jury returned a verdict in Fuller's favor. It found that she suffered damages of $36,452.35, including $2,798.00 in incidental and consequential damages. It also found that FCA willfully failed to repurchase or replace the Journey, and awarded Fuller the maximum civil penalty of double the damages, $72,904.70. The damages and penalty totaled $109,357.05.

Fuller filed a motion for attorney fees pursuant to section 1794, subdivision (d). She requested a lodestar of $215,188.50, composed of $189,643.40 for her primary attorneys at Strategic Legal Practices, APC and $25,545.00 for secondary counsel, the Law Offices of Neil Gieleghem.[2] She also requested "a 0.50 multiplier enhancement (or $107,594.25) on the attorney fees,"[3]

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[2]Gieleghem has filed a separate respondent's brief on his own behalf in this appeal.

[3] Fuller essentially asked the court to engage in a two-step procedure: (1) multiply the lodestar by 0.5 ($215,188.50 x 0.5 = $107,594.25) and then (2) add that product to the original lodestar to obtain an enhanced fee award ($215,188.50 + $107,594.25 = $322,782.75). However, as its name suggests, a multiplier requires the single step of multiplication. Thus, by requesting a fractional multiplier of 0.5, Fuller technically asked the court to *reduce* the lodestar by 50 percent: $215,188.50 x 0.5 = $215,188.50 x 50% = $215,188.50 ÷ 2 = $107,594.25. It appears that the parties and the court understood Fuller to seek a *positive* multiplier of 1.5, which would *increase* the lodestar by 50 percent

and an additional $5,000 for work associated with the attorney fee motion, for a total of $327,782.75. Fuller argued that the multiplier was warranted because her counsel engaged in "vigorous litigation" to obtain "an excellent outcome"; "the risks posed by this litigation were substantial"; "the issues involved in this litigation were complex"; and her counsel "demonstrated skill in litigating this matter."

FCA opposed the motion. It argued that the requested fees were excessive, and that a multiplier was unwarranted. FCA contended that there was no basis for a multiplier because the matter was "a routine lemon law case" "handled by law firms that specializes [*sic*] in such claims." It also disputed Fuller's contention that her counsel "assumed any meaningful risk in this case," and urged the court to consider the "well-established public policy . . . to increase the predictability and to reduce the randomness of attorney fees awards in fee shifting cases."

At the hearing on the motion, the trial court initially stated that it was inclined "to think that a multiplier is not warranted in this type of case," and asked Fuller's counsel to explain what set this case apart from a "typical" lemon law case. Fuller's counsel argued that the risk that counsel would receive little to no fees was high, due to a Code of Civil Procedure section 998 settlement offer by FCA and several unfavorable facts in Fuller's

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to her requested total of $322,782.75 by effectuating the two-step process Fuller envisioned. ($215,188.50 x 1.5 = (($215,188.50 x 1) + ($215,188.50 x 0.5)) = $322,782.75.) We refer to the multiplier as a 1.5 multiplier for accuracy and clarity, and note that FCA does the same in its opening brief. Gieleghem's assertion that "FCA cannot even correctly state the amount of the multiplier awarded, and instead inflates that multiplier by a factor of three" is not well taken.

case, including her driving the vehicle for 40,000 miles, installing aftermarket parts, and selling the vehicle prior to trial. He also argued that "FCA fought us tooth and nail every step of the way on what turned out to be a three-year lawsuit." In opposition, FCA's counsel emphasized that "no case is really slam-dunk," and argued that the multiplier would lead to a "blended rate" significantly higher than the billing rates of the junior attorneys who primarily staffed the case.

After hearing the parties' arguments, the court remarked that it was inclined to agree with Fuller's counsel that the pretrial proceedings were "somewhat trying" and "frustrating," and "took a lot of time and effort" due to "strategic decisions" defense counsel made. The court also stated that it "was surprised at the verdict," and the size of the award, which in view of the unfavorable facts on Fuller's side suggested that "counsel must have done something to warrant the verdict by the jury." The court told the parties that "what really is going to be the question is whether or not there's going to be a multiplier." It then took the matter under submission.

The court subsequently issued a written ruling granting the fee request in full, including the multiplier. With regard to the multiplier, the court found "that 1) Plaintiff's counsel obtained an excellent result under the circumstances of the case, and 2) Defendant fervently fought this litigation at every turn. Plaintiff's counsel demonstrated skill in litigating the matter and vigorously represented Plaintiff for a successful result in a case involving facts that were not all favorable to Plaintiff, including her continuing to drive the vehicle for a considerable amount of additional miles after the defect was known and making repairs outside of the dealership. This was not your typical Lemon Law

case, and involved difficult issues. Moreover, Plaintiff's counsel's representation was exceptional."

FCA timely appealed.

DISCUSSION

The sole issue on appeal is whether the trial court erred in granting Fuller's request for a fee multiplier. We conclude that it did not.

I. Governing Law

The Song-Beverly Act "'is manifestly a remedial measure, intended for the protection of the consumer.'" (*Murillo*, *supra*, 17 Cal.4th at p. 990.) To that end, section 1794, subdivision (d) operates as a one-way fee-shifting statute that permits a prevailing buyer "to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action." (§ 1794, subd. (d); *Murillo*, *supra*, 17 Cal.4th at p. 994.)

To determine a reasonable attorney fee award under section 1794, subdivision (d), the court uses the standard "lodestar adjustment method." (*Doppes v. Bentley Motors*, *Inc.* (2009) 174 Cal.App.4th 967, 997 (*Doppes*).) Under that methodology, the court begins with "a lodestar figure based on the reasonable hours spent, multiplied by the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 (*Ketchum*).) The lodestar "is the basic fee for comparable legal services in the community." (*Id.* at p. 1132.) It may be adjusted upward or downward based on various factors, including "(1) the novelty and difficulty of the

questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." (*Ibid.*) The purpose of such an adjustment, which often takes the form of a multiplier, "is to fix the fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market value of such services." (*Ibid.*) In doing so, the court "should not consider these factors to the extent they are already encompassed in the lodestar." (*Id.* at p. 1138.) The prevailing buyer has the burden of showing that the fees incurred were allowable, reasonably necessary, and reasonable in amount, and that the fee should be enhanced by a multiplier. (*Doppes*, *supra*, 174 Cal.App.4th at p. 998; *Ketchum*, *supra*, 24 Cal.4th at p. 1138.)

II. Standard of Review

We review an award of attorney fees under section 1794, subdivision (d) for abuse of discretion. (*Doppes*, *supra*, 174 Cal.App.4th at p. 998.) "The '"experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."' [Citation.]" (*Ketchum*, *supra*, 24 Cal.4th at p. 1132.) Our review, while deferential, is more than cursory. "[I]n attorney fee determinations such as this one, the exercise of the trial court's discretion 'must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that

might justify application of a multiplier.' [Citation.]" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239-1240 (*Nichols*).)

III. Analysis

FCA first contends the court abused its discretion by failing to set forth adequate bases for its findings that Fuller's counsel "obtained an excellent result under the circumstances of the case," "demonstrated skill in litigating the matter and vigorously represented Plaintiff for a successful result in a case involving facts that were not all favorable to Plaintiff," and provided "exceptional" representation. FCA also argues that the court's finding that the case was an atypical one that "involved difficult issues" was unsupported. It asserts that the findings "are simply too conclusory to support a fee enhancement in this case." We disagree.

FCA relies on *Northwest Energetic Services, LLC v. California Franchise Tax Board* (2008) 159 Cal.App.4th 841. In that case, the trial court adjusted the lodestar of $214,287.50 upward to $3.5 million based on "the expertise of [plaintiff's] attorneys, novelty and difficulty of the questions involved, the skill displayed in presenting this case, the contingent nature of the fee award, the importance of the constitutional rights preserved through this action, the results achieved, and the substantial benefits conferred on this subject though this action." (*Northwest*, *supra*, 159 Cal.App.4th at p. 880.) The court of appeal concluded that the "listing of these factors does not provide a persuasive justification for adjusting the lodestar upward," "[b]ased on the record, and in the absence of any further explanation by the trial court." (*Ibid.*)

This case is distinguishable from *Northwest*. The trial court here did more than merely list the factors that could

support an upward adjustment to the lodestar: it made specific findings relating to the facts of the case that are supported by the record. The trial court also offered some insight to its reasoning during the hearing, when it noted its surprise at the verdict and attributed Fuller's unexpected success to her counsel's efforts in the face of "frustrating" tactics used by the other side. The court also remarked on the "facts which, you know, take it outside your typical lemon law case," including Fuller's installation of aftermarket parts and continued use and sale of the vehicle, and noted that the defense relied heavily on those facts at trial. The court's findings are not, as FCA suggests, so opaque as to evince an abuse of its discretion or preclude effective appellate review.

FCA next argues that the multiplier essentially double-counted factors already reflected in the lodestar, namely counsel's performance and skill and the difficulty of the case. In *Ketchum*, *supra*, 24 Cal.4th at p. 1139, our Supreme Court explained that "a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." The trial court here expressly found that Fuller's counsel's performance was "exceptional" and led to Fuller obtaining "an excellent result under the circumstances of this case." Despite unfavorable facts, and a vigorous defense by FCA, Fuller's stable of relatively junior attorneys achieved a verdict that surprised the seasoned trial court. The trial court was within its discretion to conclude that the $414 "blended hourly rate" encompassed in the lodestar did not adequately reflect the

skill counsel demonstrated.[4]

It likewise did not abuse its discretion by concluding that the lodestar did not adequately capture the difficulty of the case. "[F]or the most part, the difficulty of a legal question . . . [is] already encompassed in the lodestar." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138.) In some cases, however, circumstances such as unfavorable facts, extensive discovery, or procedural issues may render a case more difficult than the lodestar suggests. Here, several facts cut against Fuller, and her counsel engaged in extensive discovery and had to counter litigation tactics that the trial court remarked were "not necessary" and "a bit frustrating." The court reasonably applied a multiplier to compensate Fuller's counsel for the difficulty.

FCA next speculates that "the trial court likely applied a multiplier to punish FCA," a purpose that the Supreme Court has deemed inappropriate. (*Ketchum*, *supra*, 24 Cal.4th at p. 1139.) FCA contends that "Fuller practically begged the trial court to punish FCA for defending itself, heaping invective on the company" and "strategically remind[ing] the court that FCA had at one point attempted to disqualify the court on bias grounds." According to FCA, "[t]he wording of the trial court's order strongly suggests it granted Fuller's plea for retribution and awarded a fee enhancement at least in part to punish FCA," and "[t]ransferring an extra $100,000 from FCA's pocket to Fuller's counsel and calling it a fee enhancement is not the proper means

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[4]FCA also asserts that "no sane client would pay" a blended hourly rate of $621 for "lemon law representation." It does not, however, challenge the trial court's finding that one of Fuller's attorneys with more than 30 years of experience, Gieleghem, reasonably billed $650 per hour.

for addressing Fuller's petulant grumbling about the manner in which FCA's counsel defended the case."

We are not persuaded that the trial court's order reflects an impermissibly punitive animus. The trial court found that FCA "fervently defended this litigation at every turn," and remarked during the hearing that some of FCA's strategic decisions were "somewhat trying." The record demonstrates that those statements were made in the context of explaining why this case was more difficult than a typical lemon law case. That is a proper basis for adjusting the lodestar. Even in stand-alone fee litigation, fee awards "may be enhanced when a defendant's opposition to the fee motion creates extraordinary difficulties." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 582-583.)

FCA further argues that "[t]his was not exceptional case [*sic*]." Relying primarily on nonbinding federal case law that characterizes various lemon cases as "not complex" and "routine", FCA contends that lemon law cases generally and this case specifically "are just not complicated affairs." The assessments of the individual cases cited by FCA have no bearing on the complexity or difficulty of this particular lemon law case, about which FCA says little other than characterizing it as "nothing more than a routine, unremarkable lemon-law dispute between a consumer and an automaker." The purpose of a multiplier is to ensure that the fee *in a particular action* is appropriate. (*Ketchum*, *supra*, 24 Cal.4th at p. 1132.) While some or even most lemon law cases may well be straightforward, the trial court found that this particular case was outside the main.[5] As the

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[5]We note that FCA characterized this case as "complex" in multiple filings below.

appellant, FCA bears the burden of demonstrating the court erred. Its assertion that lemon law cases generally are "not complicated" does not meet that burden.

FCA also argues that "[t]here is no evidence the representation precluded Fuller's counsel from accepting other work." In this two-sentence argument, FCA asserts that the trial court "must consider the extent to which the nature of the litigation precluded other employment by the attorneys," and that Fuller failed to present evidence of such employment preclusion here. The case FCA cites, *Nichols v. City of Taft*, *supra*, 155 Cal.App.4th at p. 1240, does not say that the trial court "must" consider this factor. Instead, it states that the lodestar "'*may*'" be adjusted, and explains, "[w]e have italicized the word 'may' . . . to emphasize the point that application of a lodestar multiplier is *discretionary*; that is, it is based on the exercise of the court's discretion after consideration of the relevant factors in a particular case." (*Nichols v. City of Taft*, *supra*, 155 Cal.App.4th at p. 1240.) The absence of evidence regarding a single factor that may not be relevant to this case does not demonstrate that the multiplier was unwarranted or that the trial court abused its discretion.

Finally, FCA argues that any "contingency risk" to Fuller's counsel "was limited and amply compensated for in the lodestar amount." It asserts that the "limited risk Fuller's counsel accepted" against the backdrop of guaranteed statutory fees if Fuller prevailed "simply does not justify a $100,000 bonus on top of the already-ample lodestar figure." FCA further asserts that the lodestar significantly exceeds the standard contingency fee of approximately 33 percent of damages and therefore "is reward enough for their efforts." Relying primarily on an unpublished

federal district court opinion, FCA suggests that Fuller's experienced lemon law counsel should have been aware of the risks involved and priced their services accordingly. Fuller acknowledges that her counsel were experienced in the area, but argues that the risk of losing at trial was substantial.

The appellate record does not contain a complete reporter's transcript of the trial. Based on the portions of transcript provided, we cannot conclude that the trial court abused its discretion in finding that Fuller's counsel "obtained an excellent result under the circumstances of the case." Unlike the counsel in a case cited by FCA, *Chodos v. Borman* (2014) 227 Cal.App.4th 76, 99, who "was entitled to payment at either $1,000 per hour or, at a minimum, at a reasonable rate, regardless of the outcome of the underlying cases," Fuller's counsel was entitled to fees only if she prevailed. While not a pure contingent fee, this arrangement posed risks to counsel, who took on the case despite the unfavorable facts against their client. Section 1794, subdivision (d) provides "strong encouragement" to consumers to seek legal redress "in a situation in which a lawsuit might not otherwise have been economically feasible." (*Murillo*, *supra*, 17 Cal.4th at p. 994.) Preventing experienced counsel from seeking a multiplier in relatively risky lemon law cases by virtue of their experience with such cases would undermine the goal of encouraging consumers to seek redress and deter lawyers from representing clients who may have unfavorable circumstances. The trial court did not abuse its discretion to the extent it considered the uncertain nature of the recovery when applying the multiplier.

DISPOSITION

The order of the trial court is affirmed. Respondents are awarded their costs of appeal.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.